82-1496

No. .....

In The

Supreme Court of the United States

October Term, 1982

HAROLD CARDWELL and THE ATTORNEY GENERAL OF THE STATE OF ARIZONA,

Petitioners,

vs.

LOUIS CUEN TAYLOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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February, 1983

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals fail to apply the "presumption of correctness", pursuant to 28 U. S. C. § 2254 (d), to relevant state court findings of fact in its order nullifying Respondent's 11-year old, 28 count, murder conviction?

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No. .....

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Petitioners Harold Cardwell and The Attorney General of the State of Arizona respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 15, 1982.

OPINIONS BELOW

1. The unreported memorandum of the Court of Appeals remanding the petition for writ of habeas corpus to the district court with instructions to issue the writ is reproduced in App. 1-4.

2. The unreported order of the district court denying the petition for writ of habeas corpus after evidentiary hearing is reproduced in App. 4-11.

3. The Court of Appeals' opinion remanding the petition for writ of habeas corpus for evidentiary hearing is reported at 579 F. 2d 1380 (9th Cir. 1978) and reproduced in App. 11-15.

4. The unreported order of the district court denying the petition for writ of habeas corpus before evidentiary hearing is reproduced in App. 16-20.

5. The Arizona Supreme Court opinion affirming Respondent's convictions is reported at 112 Ariz. 68, 537 P. 2d 938 (1975).

6. The unreported memorandum opinion and order of the state trial court on the issue of the voluntariness of Respondent Taylor's statements is reproduced in App. 21-27.

7. The Arizona Court of Appeals' opinion sustaining Respondent's transfer for prosecution as an adult is reported at 14 Ariz. App., 585 P. 2d 235 (1971).

JURISDICTION

The judgment of the Court of Appeals was entered on September 15, 1982 (App. 1-4). The order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* was filed on November 29, 1982 (App. 28). The order of the Court of Appeals staying the mandate pending the filing of a petition for writ of certiorari ". . . on or before March 6, 1982 [sic]", was filed December 29, 1982 (App. 29). This petition is filed within ninety days of the Court of Appeals' order denying the petition for rehearing. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

STATUTE INVOLVED

28 U. S. C. § 2254 (d) (App. 30-33)

STATEMENT OF THE CASE

This case involved the effective invalidation by a federal appeals court of a state conviction for 28 counts of murder. Throughout its state court history, the facts and circumstances surrounding Respondent's statements to the police were aggressively contested and recorded in a volume rarely seen. Numerous "findings" on the voluntariness issue, after extended evidentiary hearings, were articulated by the state triers of fact. The Court of Ap-

peals below virtually ignored this fact finding process and the findings themselves when it ordered the writ of habeas corpus granted.

A. Proceedings in State Courts

March 28, 1972, Respondent was sentenced to 28 concurrent life terms following his conviction by jury trial for 28 counts of first-degree murder, arising out of the arson of the Pioneer International Hotel in Tucson, Arizona, on December 19-20, 1970.

On his direct appeal, the Supreme Court of Arizona affirmed the convictions. *State v. Taylor,* 112 Ariz. 68, 537 P. 2d 938 (1975).

Prior to jury trial, the trial court conducted a voluntariness hearing and issued a memorandum opinion and order, reproduced in App. 21-27.

Further, again prior to trial and on appeal of Respondent's transfer for trial as an adult, the Arizona Court of Appeals rendered an opinion encompassing the facts and circumstances surrounding Respondent's statements the night of the hotel fire. *In re Anonymous,* 14 Ariz. App. 466, 484 P. 2d 235 (1971).

B. Proceedings in Federal Courts

On October 8, 1976, Respondent filed a petition for writ of habeas corpus pursuant to 28 U. S. C. § 2254 in the United States District Court for the District of Arizona. On February 18, 1977, the district court ordered the petition denied. The order of the district court is reproduced in App. 16-20.

On appeal of the above denial, the Court of Appeals vacated and remanded the petition for an evidentiary hearing on the issue of voluntariness. *Taylor v. Cardwell,* 579 F. 2d 1380 (9th Cir. 1978) is reproduced in App. 11-15.

Upon remand, the district judge initially reviewing Respondent's petition transferred consideration of the petition to another district judge whose untimely death caused the petition to be assigned to yet another district court. An evidentiary hearing was eventually held on November 13, 1979.

On May 18, 1981, the district court conducting the evidentiary hearing ordered the petition denied. The district court's opinion upon denial is reproduced in App. 4-11.

On appeal again, the Court of Appeals, by memorandum, remanded to district court with instructions to issue the writ of habeas corpus. The memorandum of the Court of Appeals is reproduced in App. 1-4.

C. Statement of Facts Relating to Voluntariness

As adduced at pre-trial hearings, trial and hearing on petition for writ of habeas corpus, the facts relating to the voluntariness of Respondent's statements are as follows:

Respondent, who had earlier indicated knowledge of the incendiary origin of the Pioneer Hotel fire, was taken to the Tucson Police Department, as a witness, to give a statement concerning said knowledge. He was driven from the scene of the fire to the police station by Officer Adams in an unmarked police vehicle Adams was driving that evening. Respondent sat in the front seat by the

unlocked passenger door of the vehicle[1] (HC at 18-19, 25, 33-35, 51-52). After the short ride to the station, he exited the vehicle himself and was asked to wait, unfettered, in a coffee room (HC at 20-21, 37-45; PCH at 583; VH of Oct. 15, 1971 at 58-60, 123-124, 144-146; 21T at 45-47). A short time later, Adams returned and took Taylor to a large briefing room, sat across an aisle from him and began to ask questions about what Respondent had seen earlier at the hotel (HC at 12). Inconsistencies in his story prompted Adams to advise Respondent of his *Miranda* rights (HC at 25-26; PCH at 587, 825-26; VH of Oct. 15, 1971 at 179-182, 224-225; 21T at 30-31; 126-129). At this point, approximately 3:05 A.M., Taylor indicated he understood his rights and continued to talk to Adams (HC at 14, 24).

At approximately 3:20 A.M., Detective Gassaway, whose duty that evening was to interview witnesses concerning the fire, took Respondent to a second-floor interview room (HC at 51-52). The specific confines of the room were not oppressive (HC at 53, 85-88). Sometime near the beginning of the interview Detective Murcheck joined Respondent and Gassaway (HC at 53, 84-85). Again, only after Gassaway questioned Respondent for some 30 minutes (HC at 55) and, further, only after Gassaway left the room and talked to another witness, did in-

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[1]Reference to the record of the Hearing on Petition For Writ of Habeas Corpus will be cited as HC. References to prior testimony contained in the Designated State Record will be cited as follows: PCH (for Probable Cause Hearing of January 28 through February 10, 1971), PH (for Preliminary Hearing of June and July, 1971), VH (for Voluntariness Hearing of October 15 and 26, 1971 and January 10 and 11, 1972) and T (for Trial commencing January 31, 1972).

consistencies appear and focus on Respondent (HC at 55-57). Gassaway then returned to the room and went out of his way to elaborate and again explain to Respondent his *Miranda* rights, this time in terms more understandable to a juvenile (HC at 59, 91; PCH at 636-639; VH of Oct. 15, 1971 at 182-185; 21T at 128-130). Respondent himself admits that he was familiar with and understood these rights; yet he continued to talk to the detectives an additional 45 minutes (HC at 57, 102, 224-225; 248-249; VH of Jan. 10, 1972 at 226-232).

No "Mutt and Jeff" routine was employed, no physical force was ever applied and no threats or promises made to induce Respondent to talk (HC at 89-90; PCH at 633, 635, 642; VH of Oct. 15, 1971 at 127-128, 145-146, 165-166, 173, 186-187; 21T at 136-137, 22T at 17; 40T at 19-69). Similarly, there was no pre-arranged method of questioning designed to break Respondent down (HC at 63, 90). On the contrary, the officers were polite to him both before and during questioning (VH of Oct. 15, 1971 at 58-59; 21T at 131).

Although Detective Gassaway raised his voice once or twice at Taylor when he caught Respondent in a lie or, more delicately, an "inconsistent statement" (PCH at 645, 844-845; VH of Oct. 15, 1971 at 225-232; VH of Jan. 1, 1972 at 300; 21T at 131-135), it was Respondent who really became upset when confronted with his numerous inconsistencies and who cursed with words hardly characteristic of the uninitiated and naive (HC at 58-91; PCH at 623, 645; PH at 437-438; VH of Oct. 15, 1971 at 207-208, 228).

Respondent was not denied access to water, bathroom (HC at 97; PCH at 643; VH of Jan. 11, 1972 at 134-136,

207-210; 29T at 112-113) or phone (VH of Oct. 15, 1971 at 255-256; 266-267; VH of Jan. 11, 1972 at 177-180, 187-191) when he requested same.

Sometime after Gassaway and Murcheck left the room, Detective Angely then arrived, recognized Respondent from previous contacts, talked with him 15 or 20 minutes and allowed him to make the phone calls he then requested (HC at 110-112, 114-128; PH at 244; VH of Oct. 15, 1971 at 255-256, 267-268; VH of Jan. 11, 1972 at 119-126, 138-177). Respondent did not call his mother because she either did not have a phone, or it had been disconnected, or he didn't want her to know he was in trouble again. Rather he called his girlfriend's home and instructed whoever answered not to tell his mother of his whereabouts (HC at 114, 128, 233; VH Jan. 10, 1972 at 158-160).

After Respondent volunteered to Angely to take a lie-detector test, he was taken to another building where such tests were administered (HC at 205, 224; PH at 422; VH of Jan. 10, 1972 at 222; VH of Jan. 11, 1972 at 18, 198-199). This procedure took approximately one to one and one-half hours. No statements pertaining to the test, or the facts of the test itself were ever sought to be admitted at trial (HC at 198-199).

Detective David Smith transported Respondent to the Pima County Juvenile Court Center when he came on duty. Again, Smith advised Taylor of his rights, and Taylor indicated his understanding of them (HC at 131-135). Sometime prior to Smith's arrival, Captain Gilmore of the Tucson Fire Department talked with Respondent for a few minutes (HC at 193).

Significantly, Respondent did not rise until 4:00 P.M. the afternoon of December 19, 1970 (VH Jan. 10, 1972 at 208) and did eat before ultimately going to the Pioneer Hotel (30T at 207). Further, although Respondent has consistently sought to portray the picture of a heroic child exhausted by the work of aiding victims out of the Pioneer Hotel, the great weight of the evidence indicates that he was not fatigued to any serious point (PCH at 600, 669-670, 873, 887; VH of Oct. 15, 1971 at 13). Indeed, aside from rising in the late afternoon, prior to the fire, Respondent did no work and the most exercise he had was to walk downtown and play several games of pool (30T at 194-197; HC at 218-220).

Additionally, Respondent, who had completed the tenth grade (30T at 183) was familiar with the physical surroundings of his questioning and had been to the Tucson Police Department numerous times before as a suspect (HC at 34, 232; VH of Jan. 10, 1972 at 235, 239).

The record below clearly displayed Respondent, even at the tender age of sixteen years and some months, to have been a hard-core delinquent with a manipulative personality. His overall juvenile record is remarkable for the number of police encounters and procedural experience it reflects (Petitioner's Designated State Record B, hereinafter referred to as Juvenile Record).

Prior to December 20, 1970, Respondent had been referred approximately one dozen times to the Pima County Juvenile Court Center for substantive matters ranging from burglary to robbery (Juvenile Record, Transfer Investigation). He had already been detained four times at the Arizona Department of Correction's Fort Grant In-

dustrial School for juvenile offenders (Juvenile Record, Transfer Summary and Investigation). He had previously been advised of his *Miranda* rights, represented by an attorney, testified under oath and advised that he could, if the charges were serious enough, be transferred for adult prosecution.

Hospital and psychiatric reports in evidence depict Respondent as having a sociopathic personality and being a hard-core delinquent with manipulative tendencies (Juvenile Record, Transfer Summary and Investigation; Psychiatric Reports of Arizona State Hospital and Drs. Cutts and Hertz). At one time he even feigned seizures and for some time deceived Department of Corrections and juvenile officials.

With respect to his thought processes, Arizona State Hospital and juvenile psychiatric reports show no severe mental deficiency. Indeed, before December 20, 1970, comment was made that "[Respondent] appeared . . . neat and clean and with much more poise than the average delinquent." (Juvenile Record, Psychiatric Report of Dr. Cutts).

———o———

REASONS FOR GRANTING THE WRIT

In ordering the petition for writ of habeas corpus issued, the Ninth Circuit effectively nullified Respondent's 28 count state murder conviction of some eleven years standing. In the process of doing so, that court disregarded the articulated findings of relevant facts by numerous state and federal triers of fact. In brief, the Court

of Appeals did not apply the "presumption of correctness" to state findings of fact as mandated by 28 U. S. C. § 2254 (d) or this Court in *Sumner v. Mata,* 449 U. S. 539 (1981) or *Sumner v. Mata,* 455 U. S. 591 (1982).

Certiorari should be granted so that the State of Arizona can present to a federal appellate forum those articulated findings of historical fact central to the issue of the voluntariness of Respondent's statements.

Further, certiorari should be granted so this Court can further define a federal court's role in assessing and weighing the significance of state found findings of fact in mixed questions of law and fact.

1. The Court of Appeals based its most recent opinion herein, that ordering the petition for writ of habeas corpus granted, on *Dunaway v. New York,* 442 U. S. 200 (1979) and found "[t]he record now before this court contains enough undisputed facts to establish that the challenged evidence [custodial statements] was excludable under *Dunaway* and *Brown,* without a further remand". App. 3.

However, as will be demonstrated, the state record before the habeas corpus trial court and, hence, before the Court of Appeals contained explicit, articulated, findings as to Respondent's *Dunaway* status. As will be seen, the Court of Appeals either ignored or disregarded the state fact finding on point.

Dunaway's premise that constitutionally proscribed detention may render subsequent incriminating statements likewise constitutionally infirm and inadmissible involves a threshold finding of fact as to when custody or arrest

attached and whether probable cause for arrest existed at that time. The state trial judge, after a lengthy voluntariness hearing, made specific findings of fact and conclusions of law regarding Respondent's "*Dunaway*" status:

> "The State has always argued that all statements by the defendant to police officers were made during the investigative stage of the case, when the defendant was not yet in custody—that he was not placed in custody until he was formally arrested about 8:30 in the morning. But the fact of custody depends upon substance and not form. From the time that Officer Adams asked him on the third floor of the hotel step outside until he was admitted to the juvenile detention home, the defendant was never outside the presence of a police officer. He was not requested to go to the police station to give a statement; he was taken. He was not permitted to leave the interviewing room to get a drink of water or go to the restroom; he was escorted. He was escorted to another building for the lie detector test and he was escorted back to the police station. Clearly, the defendant was in custody long before he was informed that he was under arrest.
>
> "But was he in custody from the time that Officer Adams escorted the defendant from the hotel? The Court does not think so. In *State v. Mumbaugh,* [107 Ariz. 589, 491 P. 2d 443 (1971)] the Arizona Supreme Court noted that if probable cause for arrest does not exist, detention constitutes custody where a reasonable innocent man under the relevant circumstances would believe he is not free to go. The question is a close one. Officer Adams did not testify that he told the defendant, in substance, 'I understand you know something about how the fire started and the police would like to get a statement from you'. On the other hand, the defendant was not hand-cuffed and he rode in the front seat of the police car to the station, which would reasonably lead him to believe he was not sus-

> pected of anything. The reasonableness of such a belief must certainly have been dispelled when Officer Adams read the Miranda rights to the defendant. At that point, the defendant could reasonably have believed he was not free to go. . . . when the police . . . have probable cause to arrest him." (App. 24-25).

How could the trial court have more specifically dealt with the *Dunaway* issue than as it did? Its opinion, along with a transcript of the entire voluntariness hearing, were before the district court on and at the habeas corpus hearing (HC at 5).

Again, specifically with respect to "seizure" of the Respondent's person on December 20, 1970, the night of the tragic Pioneer Hotel fire, the Arizona Court of Appeals in *In re Anonymous,* 14 Ariz. App. 466, 484 P. 2d 235 (1971) "found" after a lengthy transfer evidentiary hearing:

> "Testimony elicited at the transfer hearing shows that when Officer Adams went with the juvenile down to the police station, the juvenile was not under arrest. Initially, he was a prospective witness. He rode in the front seat with the officer and was not cuffed. When he arrived at the police station and went into the coffee room, he was not guarded in any manner. To all outward appearances he was considered a witness as were a great many other persons who later came down to the police station that morning as prospective witnesses. In fact, the only evidence at that point in time that the fire was man-made was the minor's statement to Mr. Scoggins that he saw two Negro boys in Afro haircuts start the fire. While it is true that Scoggins suggested to Officer Adams that perhaps the minor himself started the fire, we believe it was nothing more than a gratuitous remark by one who had not seen the fire start. It did not

make the minor a suspect, nor did Officer Adams give any weight to Scoggins' statement.

"When Adams first brought the minor to the police station, they went into the coffee shop where Officer Rossetti was sitting. Rossetti had a conversation with Adams at that time. Adams told Rossetti that the boy had been at the fire at the Pioneer Hotel. He did not tell Rossetti that the boy was a suspect nor did Rossetti consider the boy to be a suspect. The conversation between Rossetti and the minor was precipitated when Officer Rossetti recognized him from a few years past. He spoke to the minor and asked his name and if he remembered him. He then asked him about the fire and what he was doing in the Pioneer Hotel. At that time the minor told him that he went there to meet a friend called Tatum who worked in the kitchen someplace. He told Rossetti that he got on the elevator and went up to the third floor where he got off. At first he told him that he saw two Negroes with Afro-type hairdos and later described these two individuals as being Mexican. After talking with Rossetti, the minor then went with Adams. It was only after Adams realized that the boy was making conflicting statements that he apprised him of his Miranda rights. It is our opinion that up to this time, there was no custodial interrogation and no reason to comply with Miranda and State v. Maloney, supra."

This finding was likewise part of the record presented to the habeas corpus trial court (HC at 5).

Again, the Supreme Court of Arizona, after a lengthy rendition of the facts found:

"We now turn to the testimony of the interrogation which was set forth earlier in our recital of the facts. In examining this testimony we have come to the conclusion that Taylor was not in custody until Officer Adams, on realizing the inconsistency of the

appellant's statements, read him the Miranda rights card. We are aware that there is testimony which if believed could lead to a conclusion that the appellant was in custody much sooner, thus necessitating formal Miranda warnings, but there is substantial testimony to support the finding of the trier of fact that the prior interrogation was consistent with questioning the only witness who apparently had information concerning the origin of the fire. This issue was also considered in *In re Anonymous, supra.*" (Citations omitted) 112 Ariz. at 81, 537 P. 2d at 951.

Prior to remand and during the first federal review of this specific issue, the district court in its order dated February 18, 1977 (App. 17), found:

> "The second issue presented is whether the interrogation of petitioner on December 20, 1970, deprived him of his constitutional rights. During the fire, petitioner stated that he had seen who had started the fire. Police therefore asked him to go to the station with them to make a report. There is some conflicting testimony as to facts regarding this request but the trial court found that he was taken by the police to the police station as a witness and he properly understood that he was not in custody. As there are sufficient facts to support that finding, this Court will not disturb it. This Court, therefore, finds that petitioner was not in custody until he was advised of his rights at approximately 3:05 a.m., and statements made by him before that time were properly admitted in evidence."

The district court conducting the habeas corpus hearing made specific findings, again relating to custody or attachment or seizure of the Respondent. These findings were obviously based on both the relevant record presented by the State as part of its presentation and on testimony elicited at hearing:

"Shortly after midnight a fire broke out at the Pioneer Hotel resulting in multiple deaths. During the fire and its aftermath Taylor helped in the evacuation of victims of the fire.

"During the early morning hours Taylor approached the investigators and indicated he had information about the origin of the fire. Officer Louis Adams of the Tucson Police Department asked Taylor to accompany him to the Tucson Police Department to give a statement about what he knew.

"Taylor was taken to the police station sitting in the front seat of an unmarked police vehicle with Officer Louis Dwight Adams (Adams) driving. No other officers accompanied them. Taylor was not handcuffed in any manner and the door to the police car on the passenger side remained unlocked during the trip to the station. Adams testified that if Taylor had been under arrest at that time he would have put Taylor in the back seat to ride to the police station. Taylor was being taken to the station as a witness." (App. 5).

The Court of Appeals' memorandum does not even acknowledge the existence of these repeated, substantial, findings on the exact issue upon which it decides the writ should issue.

2. The instant case illustrates the abusive and costly road the application for federal habeas corpus relief can take. After the Court of Appeals in *Taylor v. Cardwell,* 579 F. 2d 1380 (9th Cir. 1978) (App. 11-15) remanded for an evidentiary hearing, both Petitioners and Respondent, in a time consuming and expensive manner, reviewed thousands of pages of prior testimony and, as part of the habeas record, presented the facts to the federal trier of fact. In addition, the recorded and written findings of state triers of fact were likewise presented.

Further, although *Taylor v. Cardwell, supra,* could reasonably be interpreted as requiring a hearing only on the circumstances surrounding Respondent's questioning at the police station, Respondent attempted to broaden the scope of the hearing to encompass the *Dunaway* issue, an issue, as was seen, litigated numerous times below and the findings pertaining thereto were before the federal court, as designated state records.

Indeed, as the record presented to the habeas corpus hearing court clearly shows, there was no basis for the Court of Appeals' statement in *Taylor v. Cardwell, supra,* that "[n]o state court 'found' the facts relevant to the voluntariness of Taylor's statements . . ." and remand was unjustified in the first instance.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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February, 1983

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5570

DC No. CV 78-277-TUC-MAR

LOUIS CUEN TAYLOR,

Appellant,

vs.

HAROLD CARDWELL and THE ATTORNEY GENERAL OF THE STATE OF ARIZONA,

Appellees.

Appeal from the United States District Court
for the District of Arizona

Manuel L. Real, District Judge, Presiding
Argued and submitted June 7, 1982

MEMORANDUM

(Filed September 15, 1982)

Before: GOODWIN, PREGERSON and REINHARDT, Circuit Judges

This is Taylor's second appeal to this court from the denial of habeas relief from his state conviction on 28 counts of felony murder following a hotel fire in Tucson in 1970. *See Taylor v. Cardwell,* 579 F. 2d 1380 (9th Cir. 1978).

In the first appeal we remanded the petition to the district court for an evidentiary hearing on the Fifth

Amendment issue of the voluntariness of statements Taylor made under police interrogation. The circumstances of the interrogation were such that an evidentiary hearing was necessary even though the state courts had passed upon most of the factual allegations contained in Taylor's petition for habeas corpus. Our opinion did not address the Fourth Amendment issue of the legality of Taylor's arrest, although the issue was presented to us. At the time of the first appeal the Supreme Court had not yet decided *Dunaway v. New York*, 442 U. S. 200 (1979).

Dunaway v. New York was decided after the order of remand but before the hearing on the remand. Taylor argued at the ensuing hearing that he had been arrested without probable cause and that his interrogation while in illegal custody had produced the challenged statements. He attempted to rely on *Dunaway* for the proposition that the challenged evidence should have been excluded in his state trial as the fruit of an illegal arrest. The district court refused to hear this argument on the ground that the remand from this court had been for the purpose of a hearing on voluntariness. In this respect the district court unduly restricted the scope of inquiry.

Even before *Dunaway*, *Brown v. Illinois*, 422 U. S. 590 (1975), had taught us that the giving of Miranda warnings did not necessarily break the causal connection between an illegal arrest and inculpatory statements. There was nothing essentially new in *Dunaway*, and when that case was called to the attention of the district court that court should have permitted the petitioner to argue the Fourth Amendment issue.

The record now before this court contains enough undisputed facts to establish that the challenged evidence was excludable under *Dunaway* and *Brown*, without a further remand.

Taylor, a teenager of borderline intelligence, was seen at the hotel and attracted the attention of the police because they believed he might have information about the starting of the fire. Taylor was frisked and went to the back door of the squad car assuming he was in custody. He was placed in the front seat. He asked why he was being taken to the station. He received no definite answer. He was closely watched from the moment he arrived at the station. He was thereafter surrounded by police officers. He was escorted to the bathroom and water fountain. He was never outside the presence of one or more police officers from the time he was picked up at the hotel. Like the petitioner in *Dunaway*, Taylor was not questioned briefly where he was found, but was taken in a police car to a police station where he was questioned in an interrogation room and was never informed he was free to go.

Under all these circumstances, a reasonable person in Taylor's position would not believe that he was free to go. The seizure occurred before the police had probable cause to arrest him. No significant event intervened to break the connection between the illegal seizure and Taylor's subsequent statements. *Miranda* warnings are not sufficient to attenuate the taint of an unconstitutional arrest. *Dunaway*, 442 U. S. at 216-219. We therefore hold as a matter of law that Taylor's interrogation was the product of an illegal detention and all his post-seizure

statements should have been excluded. *Dunaway, supra.*

The cause is remanded to the district court with instructions to issue the writ of habeas corpus.

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

CIV 78-277-TUC

LOUIS CUEN TAYLOR,

Petitioner,

vs.

HAROLD CARDWELL, et al.,

Respondent.

ORDER

(Filed May 26, 1981)

This matter was remanded to this Court "so that it may follow through with a decision on the facts concerning alleged duress and overreaching apart from the Miranda warnings". Taylor v. Cardwell, 579 F. 2d 1380, 1383 (9th Cir. 1978).

This Court has held a hearing at which testimony was taken on the voluntariness of Louis Cuen Taylor (TAYLOR) during interrogation as a witness and later as a suspect during the early morning hours following a fire at the Pioneer Hotel, in Tucson, Arizona on December 20, 1970.

Taylor's activities leading him to the Pioneer Hotel began when he arose from bed at around 4:00 P.M. on the afternoon on December 19, 1970. He ate, then went

downtown for a few games of pool before going to the Pioneer Hotel.

Shortly after midnight a fire broke out at the Pioneer Hotel resulting in multiple deaths. During the fire and its aftermath Taylor helped in the evacuation of victims of the fire.

During the early morning hours Taylor approached the investigators and indicated he had information about the origin of the fire. Officer Louis Adams of the Tucson Police Department asked Taylor to accompany him to the Tucson Police Department to give a statement about what he knew.

Taylor was taken to the police station sitting in the front seat of an unmarked police vehicle with Officer Louis Dwight Adams (Adams) driving. No other officer accompanied them. Taylor was not handcuffed in any manner and the door to the police car on the passenger side remained unlocked during the trip to the station. Adams testified that if Taylor had been under arrest at that time he would have put Taylor in the back seat to ride to the police station. Taylor was being taken to the station as a witness.

Arriving at the police station Taylor found his own way out of the police car and was led to a coffee room at the police station where he was asked to wait. During the time Taylor was in the coffee room he talked to Sergeant Eugene Rossetti (Rossetti) of the Tucson Police. This conversation was described by Rossetti as friendly. Rossetti also indicated that Taylor did not appear tired nor to have been the victim of any smoke inhalation.

Taylor was then asked to accompany Adams to a conference room so he could talk to him about his knowledge of the Pioneer Hotel fire. Taylor was advised of his constitutional rights as required by Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) at a conference room (a former council chamber). This advice of rights was not because Taylor was under arrest or was a suspect but because Taylor had related a story different than one Adams received from one Giles Scoggins. Another reason given for this advice of rights was that the Tucson Police Department was particularly sensitive to the Miranda decision and Adams testified: "I felt at that point I should read him his rights in case there was something that came up later." Taylor acknowledged his understanding of his rights and his consent to continue talking to Adams. After a short conversation Adams turned Taylor over to Detective Sergeant H. L. Gassaway (Gassaway).

Gassaway approached Taylor in the council chamber, identified himself and asked him to go upstairs to give a statement. Taylor accompanied Gassaway upstairs to an interview room in the detective division. In the interview room Gassaway and Taylor were joined by Detective Milan Murcheck (Murcheck).

Gassaway talked to Taylor for thirty minutes then left to talk to another witness, Mr. Scoggins for about twenty minutes. When Gassaway returned from talking to Scoggins he advised Taylor of his rights and Taylor continued to talk to Gassaway for another forty-five minutes. During this latter conversation both Taylor and Gassaway raised their voices at each other and foul lan-

guage was used. It was during these conversations that most of the statements of Taylor received in evidence at his trial were made. Gassaway then left Taylor together with Murcheck.

During all the questioning it is clear from the evidence adduced at the various hearings both in the state court and upon remand to this Court that Taylor was appropriately advised of his rights, was not promised anything, was not threatened in any way and was in full control of his faculties. These statements were made freely and voluntarily. It should also be noted that Taylor was given access to cigarettes, water and use of the bathroom facilities. Taylor never asked for an attorney to represent him nor did he request in any manner that his parents be contacted to be advised about the situation.

Taylor claims that during this conversation he told Gassaway to "get off my back." The Court does not so find but rather finds in conformance with Gassaway's testimony that what was said in language to the effect, "I lied (or told you that) to get you off my back."

After Gassaway and Murcheck left Taylor Detective Rex Angeley (Angeley) talked to Taylor in the interview room for about twenty to thirty minutes. During this conversation Taylor requested and was permitted to make a phone call. That phone call was made not to Taylor's parents but rather to his girlfriend's mother. He told the person on the phone not to tell his mother about the call or where he was.

Taylor was then taken for a lie detector test. The lie detector test and the questioning during the test were not used as evidence at Taylor's trial. Nor is there any in-

dication in any part of the record that this procedure in any way affected statements made by Taylor either before or after the test was administered. It is therefore irrelevant to the concern of this Court in determining the voluntariness of the statements admitted at the trial.

Counsel for Taylor presses on the Court the language of Gallegos v. Colorado, 37 U. S. 49, 82 S. Ct. 1209, 8 L. Ed. 2d 325 (1962) where the Supreme Court makes reference to interrogation of minors. The Supreme Court in Gallegos answering the prosecution's claim of the irrelevancy of youth, immaturity and a five-day detention of the minor resulting in the confession says at page 54

> He would have no way of knowing what the consequences of his confession were without advice as to his rights—from someone concerned with securing him those rights—and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection his own immaturity could not. Adult advice would have put him on a less unequal footing with his interrogators. Without some adult protection against this in-equality a 14-year-old boy would not be able to know, let alone assert, such constitutional rights as he had.

It is then that the Supreme Court applies as a guide to decision in juvenile cases, not a per se rule, but one of consideration of the "totality of the circumstances" in determining voluntariness of custodial statements. To apply the language of Gallegos as literally as counsel for Taylor would suggest is to forget that Gallegos preceded Miranda (supra) by four years where the Supreme Court expressed many of the same concerns about the custodial interrogation of adults.

The Supreme Court again concerned itself with custodial interrogation of juveniles in Fare v. Michael C., 442 U. S. 707, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979). In reiterating its totality of circumstances rule the Court in Fare says:

> This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why another approach is required where the question is whether a juvenile has waived his rights as opposed to whether an adult has done so.

To apply the criteria the Supreme Court includes as circumstances for inquiry "the juvenile's age, experience, education, background, and intelligence, and whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights" Fare (supra) at p. 725.

Voluntariness is at best an elusive concept. It can best be characterized as an intelligently made decision to perform in the manner of the conduct being analyzed by the Court. The intelligence necessary to the voluntariness of conduct cannot be measured simply by chronological age or intelligence quotients. Intelligence in matters of self-preservation and self-interest is significantly affected by experience. No one can quarrel that Fagan's charges could more accurately measure the consequence of confrontation with the constable than the Exeter trained classical Latin and Greek and Shakespearean literature student. Taylor was no stranger to the police station and police interrogation. The record is clear that Taylor was properly given his Miranda rights. He waived his rights

and the waiver was voluntarily and freely made. There was no duress or overreaching by any of the officers interrogating him. The statements were within the framework of constitutional safeguards—and therefore admissible in evidence against him.

Taylor raised another issue at the hearing which was not specifically addressed by the Court of Appeal in its remand. Taylor claims the statements made to Herbert Bay at the Juvenile Court Center should not have been admitted for failure of Miranda warnings.

I do not believe those statements were within the remand but in an abundance of caution and with the hope that some end might be brought to this saga I find that those statements were not cognizable within Miranda (supra).

The discussions were volunteered by Taylor and Taylor was admonished by Bay that he should not talk about the case. Any other view of the voluntariness in such a situation tortures form over substance.

This case is peculiarly within the Supreme Court's language in Fare when it says:

> He was a 16½ year-old juvenile with considerable experience with the police. He had a record of several arrests. He had served time in a Youth Camp, and he had been on probation for several years. He was under the full-time supervision of probation authorities. There is no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be. He was not worn down by improper in-

terrogation tactics or lengthy questioning or by trickery or deceit. Fare,, 442 U. S. at 726-727.

The petition is denied.

DATED: May 18, 1981.

/s/ Manuel L. Real
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-2432

LOUIS CUEN TAYLOR, Arizona State Prison Inmate No. 31176,

Appellant,

vs.

HAROLD CARDWELL and THE ATTORNEY GENERAL OF THE STATE OF ARIZONA,

Appellees.

OPINION

(Filed July 3, 1978
As Amended August 3, 1978)

Before HUFSTEDLER and GOODWIN, Circuit Judges, and FIRTH*, District Judge.

GOODWIN, Circuit Judge:

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*Honorable Robert Firth, United States District Judge for the Central District of California, sitting by designation.

Taylor was convicted in state court of twenty-eight counts of murder resulting from an arson-caused hotel fire in Tucson, Arizona, in December 1970. After the Arizona Supreme Court affirmed his conviction, *State v. Taylor*, 112 Ariz. 68, 537 P. 2d 938 (1975), he filed this petition for a writ of habeas corpus.

The district court denied the petition without an evidentiary hearing. We vacate that judgment and remand for an evidentiary hearing on the voluntariness of certain statements Taylor made during an early morning station-house interrogation.

Taylor was present in the hotel when the fire was discovered, soon after midnight. He stayed, helping in the rescue efforts, until it was extinguished. Hotel employees had found Taylor standing near the source of the flames, and he told them that he had seen two boys fighting and that they started the fire.

After the fire was out, an employee told the police about Taylor's statement. The officers took Taylor to the police station for questioning. After a while, inconsistencies in Taylor's story caused the police to believe he might have set the fire. Around 3:05 a.m. the officers read him his *Miranda*[1] rights. He agreed to continue talking. Questioning, which became heated at times, continued until 7:00 a.m., when Taylor took a lie detector test.

Taylor was sixteen and a half years old. He had an extensive juvenile record. He had no contact with outsiders except for two phone calls which he made around

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1. *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

6:00 a.m. Seven policemen and a fire inspector questioned him in relays. He never said anything that directly implicated himself, but his changing descriptions of what he had seen spun a web of suspicion around his presence at the hotel.

The attempts in state court to exclude Taylor's statements from his trial emphasized alleged *Miranda* violations. While the state trial judge said the statements were voluntary, his analysis went to the *Miranda* issue and did not deal fully with voluntariness as a separate issue. The majority and minority on the Arizona Supreme Court divided on the voluntariness issue, but in that court the disagreement was about what the facts meant rather than about what the facts were. 537 P. 2d at 950 52, 960 65. No state court explicitly "found" the facts relevant to the voluntariness of Taylor's statements and these crucial facts remain in dispute.

While Taylor's counsel emphasized the voluntariness issue apart from the *Miranda* issue in memoranda to the district court, the district court again rested its decision on the adequacy of the *Miranda* warnings. The court did not try to reconstruct the state court's implied findings of fact, nor did it make its own findings on voluntariness based on the state court record or on its own hearing. Without factual findings, the district court could not accurately address the question whether the state court's had applied the proper legal standard.

The district court must accept state court findings of historical fact if they were made after a full and fair hearing and if they have substantial support in the record. If, as here, there are no such findings on a material issue, the district court must try to reconstruct them from the state

court's legal holding and to make its own findings if it cannot adequately do so. Ordinarily, the court should conduct an evidentiary hearing for this purpose.

While federal courts defer to proper state findings of historical fact, the federal court itself must determine the legal effect of these facts, and it must apply the proper federal legal standard in doing so. 28 U. S. C. § 2254(d); *Townsend v. Sain*, 372 U. S. 293, 309 n. 6, 312-13, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963); *Stone v. Cardwell*, 575 F. 2d 724 at 726-727 (9th Cir. 1978); *Pierce v. Cardwell*, 572 F. 2d 1339, 1342 (9th Cir. 1978). Here, there were factual issues about voluntariness apart from the sufficiency of the *Miranda* warnings. We must return the case to the district court so that it may follow through with a decision on the facts concerning alleged duress and overreaching apart from the *Miranda* warning.[2]

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2. The district court carefully considered the voluntariness of Taylor's waiver of his *Miranda* rights and found the waiver to be voluntary. That finding was not sufficient, however, to resolve the issues before the court. *Miranda* establishes prophylactic rules to make the voluntariness of custodial statements more likely. It does not establish an irrebuttable presumption that all statements that comply with its rules are voluntary. Taylor's claim is that the circumstances surrounding his interrogation, including events after his *Miranda* waiver, made his statements involuntary under traditional standards. *See, e. g., Townsend v. Sain*, 372 U. S. 293 (1963); *Rogers v. Richmond*, 365 U. S. 534 (1961). Under those standards, a suspect's knowledge of his or her rights is only one factor to be considered in determining the voluntariness of the statements. *Davis v. North Carolina*, 384 U. S. 737, 740 41 (1966). The Supreme Court noted in *Miranda* that extended, isolated custodial interrogation can create psychological pressures that make statements involuntary. 384 U. S. at 455-56. While *Miranda* extended the Court's protection to custodial statements that were not clearly involuntary under traditional standards, 384 U. S. at 457, it certainly did not abolish the traditional analysis. We remand so that the district court may apply traditional standards to Taylor's case.

Taylor makes other federal claims, but none justifies habeas relief. The Arizona standards for transfer from juvenile court to adult court are somewhat general but they state the relevant areas for the juvenile court to consider. We are not prepared to hold that they are unconstitutional as applied in this case. The juvenile court, after prodding by the Arizona Court of Appeals, made detailed findings explaining its decision to transfer. *In the Matter of Anonymous,* 14 Ariz. App. 466, 484 P. 2d 235, 242-43 (1971). We assume that the court's findings and decision genuinely explained the juvenile court's action and were not *post hoc* rationalizations. The Supreme Court requires standards primarily to make appellate review effective. *Kent v. United States,* 383 U. S. 541, 561, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966). If the standards are vague, adequate findings can flesh them out. They did so here.

A key witness against Taylor gave an unsworn statement after the trial that his testimony had been false and that the prosecutor knew it was false. However, in a post-trial hearing he swore that his testimony was true. The state court found that the prosecution did not knowingly use perjured testimony. The district court appropriately accepted this finding of a historical fact; none of the grounds for rejecting it applies.

Taylor asserts that other prosecutorial misconduct deprived him of a fair trial, but he does not show specifically how the prosecutor's actions prejudiced him. His allegations therefore do not call for habeas relief.

Vacated and remanded.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV. 76-734 PHX-CAM

LOUIS CUEN TAYLOR, Arizona State Prison Inmate No. 31176,

Petitioner,

vs.

HAROLD CARDWELL,

Respondent,

and

THE ATTORNEY GENERAL OF THE STATE OF ARIZONA,

Additional Respondent.

ORDER

(Filed February 18, 1977)

This Court having received and considered petitioner's habeas corpus petition and the response and reply thereto, finds the petition is denied.

Three issues have been presented to this Court. The first is whether the guidelines for transfer of a juvenile to be tried as an adult as provided for in the Arizona Rules of Procedure for Juvenile Court are so vague as to be unconstitutionally vague. The Arizona rules require that in order to transfer a juvenile to adult jurisdiction, a hearing must be held before a judge and he must determine: (1) that the child is not amenable to treatment or rehabilitation as a child; (2) that the child is not commitable for mental illness; and (3) that the safety or interests of the public requires transfer. This Court, therefore, finds that these guidelines as proscribed by the Arizona Rules of Procedure for Juvenile Court are sufficient to comply with

due process requirements of the Constitution for such a transfer, and that they were followed in this case. *Kent v. U.S.*, 86 S. Ct. 1045 (1966).

The second issue presented is whether the interrogation of petitioner on December 20, 1970, deprived him of his constitutional rights. During the fire, petitioner stated that he had seen who had started the fire. Police therefore asked him to go to the station with them to make a report. There is some conflicting testimony as to facts regarding this request but the trial court found that he was taken by the police to the police station as a witness and he properly understood that he was not in custody. As there are sufficient facts to support that finding, this Court will not disturb it. This Court, therefore, finds that petitioner was not in custody until he was advised of his rights at approximately 3:05 a.m., and statements made by him before that time were properly admitted in evidence.

The statements made by petitioner after he was advised of his constitutional rights were made while in custody and therefore can only be admissible if he made a voluntary and intelligent waiver of his constitutional rights. The facts do show that petitioner was properly advised of his rights and that he did waive these rights and agree to talk. The question facing this Court is whether he had the capacity to waive them and in fact did so intelligently. This Court finds that it is possible for a juvenile to knowingly and intelligently waive his rights, and he may do so without the advice or consent of a parent or attorney. Whether a juvenile has made such a waiver must turn on the facts of each particular case.

In the case before this Court, the juvenile was sixteen years and eight months old, and has had numerous contacts with juvenile court since the age of eleven, including four trips to Fort Grant Correctional Institution. Because of his part record, petitioner was well aware of his *Miranda* rights and what they meant, and while he had never been tried as an adult, he had been warned of that possibility. Taking all the factors into account, this Court finds that petitioner understood his rights and made a voluntary and intelligent waiver of those rights, and it was not necessary that a parent or adult consent to that waiver. This Court further finds that the custodial interrogation of petitioner was therefore not in violation of his constitutional rights.

The third issue presented to this Court is whether the conduct of the prosecutor was such as to deprive petitioner of a fair trial and due process of law. Most of the allegations with respect to this issue can be disposed of summarily. The evidence simply does not support petitioner's claim that the prosecutor misled or lied to the Court about witnesses, or that the prosecutors caused witnesses to change their testimony and commit perjury at trial.

Petitioner also asserts misconduct because of the length of the State's witness list. The prosecutor greatly reduced his witness list to a number which he may have needed to call had the trial gone differently or had the testimony of some witnesses not been stipulated to. Furthermore, it appears from the record that defense counsel asserted that he was prepared to go to trial and opposed any continuances, and this Court therefore finds that if the prosecutor did act improperly, any resultant error was harmless.

Petitioner also alleges that the *Brady* doctrine was violated through incomplete disclosure, however, petitioner has presented no examples of favorable evidence that was not either disclosed or somehow obtained by defense counsel prior to trial and has, therefore, shown no prejudice.

Petitioner's allegations that he was deprived of a fair trial by the prosecutor's numerous objections and interruptions is likewise without merit. Both the State and defense counsel interposed more than 1000 objections each in this lengthy trial, however, from the record it appeared certain that defense counsel was most capable and more than able to properly offset any possible prejudice caused by the numerous objections.

Petitioner's final allegation is that the prosecutor tampered with Witness Jackson and allowed his perjured testimony to stand. Jackson came forward with critical testimony after the State had rested, and after being permitted by the Court to re-open their case, the prosecution put Jackson on the stand to testify that petitioner had told him that he, petitioner, had started the fire. After the jury had returned a guilty verdict, Jackson made a recorded but unsworn statement in which he said that he had lied at trial because the prosecutor had induced him to do so. Petitioner therefore moved for a new trial and at the hearing on that motion, Jackson testified that he had in fact told the truth at trial and only given the unsworn statement to get petitioner off his back.

This evidence of misconduct presented to this Court could not even be introduced to impeach this witness. Petitioner has had an opportunity to ask Jackson if he told the truth at trial, and he testified that he did. This Court will not call Jackson to testify a third time about a matter

which he has always testified consistently. This Court, therefore, finds that under these circumstances, that unsworn statements will not stand as evidence of prosecutorial misconduct as to warrant habeas corpus relief.

IT IS THEREFORE ORDERED that since the claims have been fully briefed in the pleadings, no oral arguments need be heard by this Court.

IT IS FURTHER ORDERED that since this Court has before it, transcripts of all proceedings relating to this petition from the inception of juvenile proceedings through the affirmance of the conviction, and this Court has made an independent review of those proceedings, and it appears that due process was afforded the petitioner in all stages of the proceedings, this Court adopts the findings of facts of the state court pursuant to *Townsend v. Sain,* 372 U. S. 293 (1973). In the opinion of this Court, the conclusions of law expressed by the state courts did not deny any constitutional guarantees of petitioner.

IT IS FURTHER ORDERED that the habeas corpus petition is denied.

DATED: February 18, 1977.

/s/ C. A. Muecke
United States District Judge

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

No. CR-69983
(Pima County No. A-19672)

THE STATE OF ARIZONA,
Plaintiff,

vs.

LOUIS C. TAYLOR,
Defendant.

MEMORANDUM OPINION AND ORDER

The Court has had under advisement defendant's motion to suppress as evidence the matches which were taken from the defendant's presence when he was admitted to the juvenile detention home on December 20, 1970. The Court has also had under advisement a determination of whether statements made by the defendant to police officers in the early morning hours of December 20th were obtained in compliance with constitutional requirements. A brief exposition of the evidence which the Court has considered is appropriate. Only the evidence which the Court has considered is appropriate. Only the evidence is being set forth which appears to have been within the knowledge of the Tucson Police Department at the time the defendant was notified that he was under arrest about 8:30 o'clock a. m., December 20, 1970.

The defendant was in the hotel before the fire was discovered and he was at the scene of the fire shortly after

it was discovered. He told Scoggins, a hotel employee, "I saw two colored boys with African hairdos and they were fighting and scuffling and they started the fire." About 2:00 o'clock a. m. Scoggins told police officer Adams that he had seen a Negro male standing near the fire who had told him that he had seen two Negro boys fighting and that a fire had started and gave a description of the person he had seen. They then began to search for this person. After searching through the crowd watching the fire, they went back to the hotel and as they were walking down a corridor on the third floor, the defendant poked Officer Adams on the shoulder and told him that there were some boys on the 7th and 8th floor running around who didn't belong there. Officer Adams started to accompany the defendant upstairs when . . . looking for. Adams then took the defendant out to police Sergeant Lingham and Sergeant Lingham told him to take the defendant to the police station where the detectives would take a statement from him.

Officer Adams then escorted the defendant to his police vehicle. When the defendant asked if he should get in the back seat, Officer Adams told him that there was no reason for this because he was not under arrest. However, Officer Adams did take the precaution of frisking him.

When they arrived at the police station, Officer Adams had the defendant sit in a coffee room while he went to his desk sergeant for instructions. There were other police officers in the room at all times.

When Officer Adams returned, he took the defendant to the assembly room. After obtaining the defendant's name, address and age, he asked the defendant to tell him

what had happened. Defendant told him that he had gone to the hotel to meet a friend of his named Tatum, that he saw smoke coming from a vent, that he went up to the third floor and saw two boys running. He described them as a Mexican male and a white boy. Officer Adams then told the defendant that he had heard earlier a slightly different version and he proceeded to read to the defendant his Miranda rights.

The defendant was then taken upstairs by Detective Gassaway to the detective division and placed in an interviewing room where he was questioned by Detectives Gassaway and Murchek. After a few minutes, Detective Gassaway left the room to talk to Scoggins and a security officer of the hotel, who had come to the police station. Based upon information which he obtained from them, Detective Gassaway returned to the interviewing room and informed the defendant that he did not feel that the defendant had been truthful. He then proceeded not only to read the Miranda rights to the defendant but to explain each sentence on the card.

The defendant testified that he understood his Miranda rights. . . . a juvenile, he inquired whether the parents had been notified. He was told by a superior that this would be taken care of. However, no effort was made to notify the defendant's mother that her son was in custody until after he had been taken to the juvenile detention home.

While talking to Detectives Gassaway and Murchek, the defendant again gave descriptions of whom he had seen at the scene of the fire which conflicted with what he had told Scoggins. He also contradicted himself as to why he had been in the hotel.

During the time that Detectives Gassaway and Murchek questioned the defendant (about two and one-half hours), he left the interviewing room only twice—once to get a drink of water and once to go to the restroom. In each case, he was accompanied by Detective Murchek.

About 6:00 o'clock in the morning Detective Angeley, who was acquainted with the defendant, relieved Detectives Gassaway and Murchek. The defendant told Detective Angeley that he wanted to make a telephone call. He was taken to a telephone and Detective Angeley dialed the number for the defendant. There was no answer to the call and the defendant then asked that another number be dialed. This second call was answered by Mrs. Neill, the mother of a girlfriend of the defendant. The defendant told her that he was in custody, cautioned her not to tell his mother and asked her to get him a lawyer.

The defendant then told Detective Angeley that he would be willing to take a lie detector test. Arrangements were made for the test and an officer took the defendant from the police station to another building where the test was administered. At the completion of the test, the defendant was returned to the police station.

About 8:30 in the morning, the defendant was informed that he was being arrested for arson. He was taken to the juvenile detention home. During the course of admitting him to the home, he was searched and a number of books of matches were found on his person.

The State has always argued that all statements by the defendant to police officers were made during the investigative stage of the case, when the defendant was not yet in custody—that he was not placed in custody until

he was formally arrested about 8:30 in the morning. But the fact of custody depends upon substance and not form. From the time that Officer Adams asked him on the third floor of the hotel to step outside until he was admitted to the juvenile detention home, the defendant was never outside the presence of a police officer. He was not requested to go to the police station to give a statement; he was taken. He was not permitted to leave the interviewing room to get a drink of water or go to the restroom; he was escorted. He was escorted to another building for the lie detector test and he was escorted back to the police station. Clearly, the defendant was in custody long before he was informed that he was under arrest.

But was he in custody from the time that Officer Adams escorted the defendant from the hotel? The Court does not think so. In *State v. Mumbaugh,* — Ariz. —, filed December 9, 1971, the Arizona Supreme Court noted that if probable cause for arrest does not exist, detention constitutes custody where a reasonable innocent man under the relevant circumstances would believe he is not free to go. The question is a close one. Officer Adams did not testify that he told the defendant, in substance, "I understand you know something about how the fire started and the police would like to get a statement from you." On the other hand, the defendant was not handcuffed and he rode in the front seat of the police car to the station, which would reasonably lead him to believe he was not suspected of anything. The reasonableness of such a belief must certainly have been dispelled when Officer Adams read the Miranda rights to the defendant. At that point, the defendant could reasonably have believed he was not free to go. . . . when the police . . . have probable cause

to arrest him. When a defendant illegally arrested makes statements while in custody, giving the Miranda warnings may not be sufficient to overcome the taint of the illegal arrest. See *In re Rambeau,* 72 Cal. Rptr. 171, and compare *People v. Martin,* 49 Cal. Rptr. 888. However, the defendant understood his Miranda rights. Furthermore, on two occasions prior to December 20, 1970, the defendant had been accused of serious crimes and had been advised that he could be prosecuted as an adult. The Court doubts that anything would have been changed had the defendant's mother been notified sooner that her son was in custody.

The Court finds that the defendant understood his constitutional rights not to incriminate himself and to be represented by counsel and that his statements to the police officers were made voluntarily.

ADMISSIBILITY OF MATCHBOOKS

If there was no probable cause to arrest the defendant, the seizure of the matchbooks was illegal and the motion to suppress must be granted. *Wong Sun v. United States,* 371 U. S. 471, 82 S. Ct. 497, 9 L. Ed. 2d 441.

To establish probable cause the evidence need not amount to proof of guilt, or even prima facie evidence of guilt. 5 Am. Jur. 2d, Arrest, Sec. 44, p. 735. It is sufficient if the evidence would warrant an officer of reasonable prudence and caution in believing that a felony has been committed and that the person to be arrested is guilty of the crime. *State v. Robinson,* 6 Ariz. App. 424, 433 P. 2d 75.

None of the cases cited by defendant in support of his motion to suppress ruled on whether there was sufficient evidence to constitute probable cause. They all concerned the sufficiency of evidence to sustain a conviction. . . . to constitute probable cause for the defendant's arrest:

1. The fire was made made. This evidence came from the defendant himself.

2. The defendant had no apparent business in the hotel.

3. The defendant had the opportunity to set the fire.

4. The defendant's accounts of what he had observed were inconsistent.

IT IS ORDERED denying defendant's motion to suppress the matchbooks taken from the person of the defendant.

DATED this 21st day of January, 1978.

/s/ Charles L. Hardy
Judge of the Superior Court

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5570

DC No. CV78-277-TUC-MAR

LOUIS CUEN TAYLOR,

Appellant,

vs.

HAROLD CARDWELL and THE ATTORNEY GENERAL of the STATE OF ARIZONA,

Appellee.

ORDER

(Filed November 29, 1982)

Before: GOODWIN, PREGERSON and REINHARDT

The panel has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the case en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5570

DC CV 78-0277 MAR

LOUIS CUEN TAYLOR,

Petitioner/Appellant,

vs.

HAROLD CARDWELL and THE ATTORNEY GENERAL of the STATE OF ARIZONA,

Respondents/Appellees.

ORDER ON MOTION FOR STAY OF MANDATE

(Rule 41(b) Fed. R. App. P.)

(Filed December 22, 1982)

Upon due consideration of *respondents-aples* motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before March 06, 1982,

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby allowed.*

/s/ Alfred Goodwin
United States Circuit Judge

GOODWIN

*In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

28 USC § 2254(d)

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such

factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record;

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.